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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LESLIE R. JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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(Member of the Bar of This Court)

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is Jones v. State, 411 So.2d 165 (Fla. 1982), and is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered January 21, 1982, and petitioner's timely motion for rehearing was denied on April 8, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix C. This case involves the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution [as made applicable to the States through the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)].

STATEMENT OF THE CASE

Petitioner was convicted of first degree murder, assault with intent to commit first degree murder, and robbery, and on May 15, 1975 was sentenced to death. The Supreme Court of Florida, on June 30, 1978, reversed the conviction and sentence and remanded the case for a new trial. Jones v. State, 362 So.2d 1334 (Fla. 1982) [Appendix H]. Upon retrial, petitioner was again convicted of the same three offenses, and on February 16, 1979 the death penalty was again imposed.

In the second penalty proceeding, the trial judge found that five aggravating circumstances were present, two of which he had expressly found not to be present in the first penalty proceeding. Specifically, the court found that the defendant was

under sentence of imprisonment at the time of the offense, in that he was on parole, and that the offense was committed to disrupt or hinder the enforcement of laws, in that the defendant shot the victims because they could recognize him [Appendix E]. In the initial penalty proceeding, the same trial judge found, inter alia, "A. The defendant was not under sentence of imprisonment for any other crime" and "H. This capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." [Appendix D].

The Supreme Court of Florida affirmed the conviction and death sentence. Jones v. State, 411 So.2d 165 (Fla. 1982) [Appendix A]. Petitioner's motion for rehearing was denied on April 8, 1982 [Appendix B].

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal, petitioner asserted that the Florida Supreme Court was constitutionally compelled to reject the trial court's findings that the capital offense was committed while under sentence of imprisonment and that the capital offense was committed to disrupt or hinder the enforcement of laws [Appendix F]. As authority for his argument, petitioner relied on this Court's decisions in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (due process); Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (double jeopardy); and Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 27 L.Ed.2d 469 (1970) (double jeopardy/collateral estoppel) [Appendix F, Appendix G]. Petitioner argued that the state was constitutionally prohibited from taking "two bites at the apple of proof" [Appendix F].

In its opinion affirming petitioner's conviction and death sentence, the Florida Supreme Court did not discuss the issue, or acknowledge that it was raised [Appendix A].

On motion for rehearing, petitioner pointed out that the Court had not addressed his due process/double jeopardy claim

involving the two additional aggravating circumstances found in the second penalty proceeding [Appendix D]. Petitioner also called the Court's attention to this Court's intervening decision in Bullington v. Missouri, ___ U.S. ___, 101 S.Ct. ____, 68 L.Ed.2d 270 (1981) [Appendix B]. This was the only issue raised on motion for rehearing. The motion was denied without opinion on April 8, 1982 [Appendix B].

REASONS FOR GRANTING WRIT

QUESTION PRESENTED

QUESTION

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In Bullington v. Missouri, ___ U.S. ____, 101 S.Ct. ____, 68 L.Ed.2d 270 (1981), this Court held that where, under applicable Missouri procedure, a jury has heard evidence in aggravation and mitigation in a separate penalty proceeding and has imposed a life sentence upon a defendant, the Double Jeopardy Clause prohibits imposition of the death penalty on his subsequent retrial. In contrast to the usual sentencing proceeding, it can be demonstrated that a Missouri jury's life sentence amounts to an "acquittal" of the elements necessary to impose the death penalty, because (1) the state must prove additional facts, at a proceeding resembling a trial, to warrant imposition of a death sentence, and (2) in order to impose a sentence of death, the jury must designate the aggravating circumstances it has found beyond a reasonable doubt, and must be convinced beyond a reasonable doubt that such aggravating circumstances are sufficient to warrant the death penalty. This Court said:

> The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant' [United States v. DiFrancesco, ___ U.S. ____, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980)], thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State,not the defendant, that should bear 'almost the entire risk of error'. Addington v. Texas, 441 U.S., at 424, 60 L.Ed.2d 323, 99 S.Ct. 1804. Given these considerations, our

> decision today does not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received 'one fair opportunity to offer whatever proof it could assemble', Burks v. United States, 437 U.S., at 16, 57 L.Ed.2d 1, 98 S.Ct. 2141, the State is not entitled to another.
>
> Bullington v. Missouri, supra, 68 L.Ed.2d at 283.

In Florida, as in Missouri, the reasonable doubt standard is used to determined whether a given aggravating circumstance has been proven. State v. Dixon, 283 So.2d 1 (Fla. 1973); Alford v. State, 307 So.2d 433 (Fla. 1975); Williams v. State, 386 So.2d 538 (Fla. 1980). In Florida, unlike Missouri, the jury's verdict as to penalty in a capital case is advisory; the sentencing authority is the trial judge. Fla. Stat. §921.141 (2) and (3); see Ross v. State, 386 So.2d 1191 (Fla. 1980). The Florida judge, like the Missouri jury, must set forth in writing his findings upon which the death sentence is based. Fla. Stat. §921.141(3); see Hall v. State, 381 So.2d 683 (Fla. 1978) (Order for Clarification).

In the instant case, following the first trial and penalty proceeding, the trial court expressly found that petitioner was not under sentence of imprisonment and that the crime was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Following the second trial and penalty proceeding, on the basis of additional evidence adduced by the state, the trial court changed its mind and found that these aggravating circumstances did apply. This amounts to a classic example of the state taking a second bite at the apple; a bite which was available only because appellant had successfully appealed his first conviction. These aggravating circumstances were therefore improperly found, under the doctrines of double jeopardy, Bullington v. Missouri, supra; Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); and collateral estoppel,

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1169, 25 L.Ed.2d 469 (1970).

It cannot be assumed that the trial court's error in considering additional evidence of aggravating circumstances of which appellant had previously been "acquitted" was harmless. The jury was thereby exposed to facts which may have improperly influenced its decision to return a recommendation of death rather than a life recommendation. See Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980).[1] Had the jury recommended life, the trial court might well have concluded that the facts suggesting a death sentence were not so clear and convincing as to justify overriding the jury's recommendation. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

In addition to its impact on petitioner individually, the issue involved in this case will be a recurring one. Any time an appellate court reverses a conviction upon which the death penalty has been imposed for a new trial,or reverses a death sentence for a new trial on the issue of penalty, the question may arise as to whether the state can present evidence of aggravating circumstances it failed to prove the first time around. Like Florida, a substantial majority of those states which allow the death penalty require the trier of fact to designate the specific aggravating circumstances which have been proven

[1] In Zant v. Stephens, ___ U.S. ___ (1982) (case no. 81-89, opinion filed May 3, 1982) (31 Cr.L. 3035), this Court directed the Supreme Court of Georgia, pursuant to that state's certification procedure, to provide the premises of state law which support its conclusion that the validity of the death sentence was not impaired by the invalidity of one of the aggravating circumstances upon which the sentence was based.

by the state.[2] The Supreme Court of North Carolina discussed the double jeopardy ramifications of re-sentencing in capital cases in State v. Silhan, 275 SE.2d 450, 482 (N.C. 1981):

> . . . We derive the following principles applicable to our capital sentencing procedure: The Double Jeopardy Clause is a limitation on the state's, not the defendant's power to proceed. If a life sentence is imposed following conviction for a capital crime, the state may not appeal nor may a new sentencing hearing be ordered on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant. This would be tantamount to defendant's having been acquitted of the death penalty. If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the state from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. The dictates of double jeopardy would preclude the state from relying on any aggravating circumstance of which it offered insufficient evidence at the hearing appealed from. This would be tantamount to the state's having offered insufficient evidence of an essential element of a criminal offense in which case the state, because of double jeopardy considerations, could not retry the defendant even it had sufficient evidence which could be offered at a new trial. Similarly the prohibition against double jeopardy would preclude the state from relying, at a new sentencing hearing, on any aggravating circumstance the existence of which the jury at the hearing appealed from, upon considering it, failed to find. The jury's failure to find the existence of the aggravating circumstance, after it had considered it, would be tantamount to defendant's having been acquitted of this circumstance.

The Supreme Court of Georgia reached a contrary conclusion

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[2] See e.g. Ala. Crim. Code §13A-5-33; Ariz. Rev. Crim. Code §13-703(D); Cal. Penal Code §190.4(a); Comm. Penal Code §53a-46a(d); Georgia Code §27-2534.1(c); Idaho Code §19-2515(d); Ky. Penal Code 532.025(3); La. C.Cr.P., Art. 905.7; Md. Code, Art. 27, §413(j)(1); Mass. Laws, C. 279, §54; Miss. Code §99-19-101(3); Mo. Rev. Stat. §565.012(4); Mont. Rev. Codes §95-2206.11; Neb. Rev. Stat. §29-2522; N.M. Stat. §31-20A-3; N.C. Gen. Stat., Art. 100, §15A-2000(c)(1); Okla. Stat. 701.11; Pa. Cons. Stat. §1311(f)(1); Tenn. Code §39.2404(g); S.D. Comp. Laws §23A-27A-5; Wyo. Stat. §6-4-102(e).

in Zant v. Redd, 290 SE.2d 36 (Ga. 1982), holding that the Double Jeopardy Clause did not preclude consideration at re-sentencing of aggravating circumstances submitted to, but not designated by, the original sentencing jury. Since conflict among state courts of last resort on a federal constitutional issue is a prime consideration in this Court's determination of whether to grant certiorari [Supreme Court Rule 17.1(b)], that is all the more reason why this petition should be granted.

Moveover, Zant v. Redd, supra, is distinguishable from the present case in one highly significant respect. In that case, the Georgia Court said:

> An alternative process is not involved in a jury's consideration of aggravating circumstances. . . . The jury's decision with regard to aggravating circumstances is not a mutually exclusive one as it is with regard to the choice of life or death. Consequently, we cannot say, as the Supreme Court did with regard to the choice of life or death, that the listing of only one of three aggravating circumstances in support of the death penalty is an 'acquittal' of the other two. The procedural basis which lead the court to its decision in Bullington does not exist in this case.

In the present case, in contrast, the trial court in the first sentencing proceeding did not merely fail to list the two aggravating circumstances; rather, he made express findings of fact that these circumstances did not exist. In Ashe v. Swenson, supra, this Court held that collateral estoppel, which it defined as "the principle that bars relitigation between the same parties of issues actually determined at a previous trial", is embodied in the Fifth Amendment guarantee against double jeopardy. In the initial sentencing proceeding in the present case, the trial court's express findings that the defendant was not under sentence of imprisonment, and that the capital felony was not committed to disrupt or hinder the enforcement of laws, were determinations of ultimate fact. The Double Jeopardy Clause therefore prohibited the state from offering proof of those aggravating circumstances at the second penalty proceeding. The jury should not have heard

evidence of those aggravating circumstances before returning a recommendation of life or death. The trial court could not constitutionally consider those circumstances in imposing the death penalty, and the state appellate court could not consider those circumstances in reviewing the death penalty.

This constitutional issue will continue to arise until it is resolved. This Court should grant certiorari to resolve it.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX

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Leslie R. JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 56199.

Supreme Court of Florida.

Jan. 21, 1982.

Rehearing Denied April 6, 1982.

Following reversal of conviction, 362 So.2d 1334, the Circuit Court, Escambia County, William S. Rowley, J., convicted defendant, on remand, of first-degree murder, assault with intent to commit first-degree murder, and robbery, and defendant appealed. The Supreme Court held that: (1) defendant could not object to instructions for the first time on appeal; (2) trial court did not err in refusing to declare mistrial after learning that one of the jurors had talked to daughter of murder victim; (3) trial judge did not err in refusing to disqualify himself from participation in sentencing phase of the trial; (4) defendant could not object for the first time on appeal to prosecutor's comments in sentencing proceeding; (5) trial court properly instructed jury concerning aggravating and mitigating circumstances; and (6) death was the appropriate penalty.

Affirmed.

1. Criminal Law ⇐1038.1(3)

Defendant could not object, for the first time on appeal, to instructions given jury on issue of separate consideration of each count of the indictment.

2. Criminal Law ⇐1154(3)

Trial court did not abuse its discretion in refusing to declare mistrial after learning that one of the jurors had talked to daughter of murder victim, with whom she was acquainted, where communication did not directly relate to matters being tried and acquaintance between the two was distant and superficial.

3. Judges ⇐51(2)

Trial judge did not err in refusing to disqualify himself from participation in sentencing phase of trial, where motion to disqualify, based on the judge having previously sentenced him to death, was filed at beginning of sentencing hearing after the judge had presided over guilt phase of the trial. West's F.S.A. Rules Crim.Proc., Rule 3.230(c); West's F.S.A. § 921.141(3, 6).

4. Criminal Law ⇐1037.1(1)

Where defendant failed to object at trial to prosecutor's comments in sentencing proceeding, defendant could not raise argument for the first time on appeal.

5. Criminal Law ⇐1173.2(4)

Trial judge did not commit reversible error at penalty phase of trial by failing to instruct jury that mitigating circumstances it could consider were not limited to those listed in statute, where judge instructed jury that its recommendation should be based on all evidence presented, defendant's sister testified in his defense at penalty phase and no limitations were placed on matters about which she was allowed to testify, judge's instruction followed statute in telling jury that aggravating circumstances were limited to those enumerated in statute and, in instructing on mitigating circumstances, judge did not say that consideration was similarly limited. West's F.S.A. § 921.141(6).

6. Homicide ⇐354

Death sentence following conviction of first-degree murder, assault with intent to commit first-degree murder, and robbery was appropriate, in view of evidence that defendant committed murder with premeditation, defendant was under sentence of imprisonment when he committed murder, defendant had previously been convicted of robbery, murder was committed in the course of robbery, defendant shot victims in order to eliminate them as witnesses against him for the crime of robbery, and murder was especially heinous, atrocious or cruel in that defendant ignored victim's plea to be spared and shot him to death point blank in the style of an execution. West's F.S.A. § 921.141(5)(a, b, d, g, h).

Michael M. Corin, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and David P. Gauldin, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction of first-degree murder, assault with intent to commit first-degree murder, and robbery, and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

FACTS

Appellant was tried, convicted, and sentenced after this Court reversed his earlier conviction on the same charges and remanded the case for a new trial. *Jones v. State*, 362 So.2d 1334 (Fla.1978). The same judge who had previously presided and sentenced appellant to death presided on remand.

The evidence showed that appellant entered a liquor store armed with a .32 caliber pistol. His accomplice Calvin Dugan entered carrying a .38 caliber pistol. Two store clerks, Peter Petros and Dorothy Hagg, were ordered to open their cash registers and then to lie down on the floor. They were then shot. Peter Petros died but Dorothy Hagg survived.

Dorothy Hagg testified that after being ordered to lie on the floor she heard two shots and then felt something pound her head. Although she did not see who fired the shots, she said she knew it was appellant because they came from the location where he was standing.

The medical evidence showed that Mr. Petros' death was caused by a gunshot wound to the back of his head and that Dorothy Hagg was struck by two bullets, one in the arm and chest and the other in the back of the head. A firearms examiner testified that three recovered bullets were .32 caliber. One of the bullets was conclusively shown to have been fired from a pistol recovered from the home of appellant's nephew, where appellant had been staying until the day of the robbery.

Calvin Dugan testified that he heard three shots after leaving the store and that appellant later told him he shot the victims because they recognized him. The state's evidence also included a tape recorded confession in which appellant admitted that he did the shooting. At trial, appellant testified that he participated in the robbery but had entered a back room of the store when he heard three shots.

After the jury was selected and sworn, but before the commencement of the state's case, one of the jurors turned to the victim's daughter, Betty Petros, and asked, "Betty, what are you doing here?" Ms. Petros replied, "I'm a spectator, and I'm not allowed to speak to anyone." The defendant observed this exchange and informed his attorney. Defense counsel brought the matter to the court's attention, and an extensive inquiry was conducted. State and defense counsel were permitted to question both Ms. Petros and the juror. The defendant told the court he saw Ms. Petros speak to a second juror, but she maintained that she spoke only to one juror. The juror told the court she knew Ms. Petros only as Betty, that she was curious about her attendance at the trial, but that she believed she could still be a fair and impartial juror.

The testimony revealed that Ms. Petros and the juror who spoke to her had been school acquaintances ten years earlier but had had no contact whatsoever since that time. The court called several other witnesses to inquire whether anyone could corroborate the appellant's claim that Ms. Petros had exchanged words with a second juror. A bailiff and a person who had been a prospective juror both testified that they saw no such exchange.

Defense counsel moved for a mistrial on the grounds that a juror talked with the daughter of the deceased victim and that there was testimony that another juror also talked with her. The court denied the motion.

After the guilt phase of the trial culminated in a verdict of guilty on all three

counts, but before the commencement of the sentencing phase, the defense moved to disqualify the judge from presiding at the sentencing portion of the trial. The ground of the motion was that since the judge had already once sentenced appellant to death, he was prejudiced in favor of a sentence of death. The judge denied the motion saying that his having followed the law in earlier sentencing appellant to death was no ground for a claim of prejudice.

ISSUES ON APPEAL OF THE JUDGMENT OF CONVICTION

[1] Appellant contends that the trial court committed reversible error in its instructions to the jury, by engendering confusion on the issue of separate consideration of each count of the indictment. It was not clear from the instructions, says the appellant, that the jury could acquit on one or more but not all counts of the indictment and find the defendant guilty on others.

The defendant, however, did not object to these instructions. Florida Rule of Criminal Procedure 3.390(d) clearly states that "[n]o party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection." Therefore, we decline to consider this issue on appeal.

[2] Appellant contends that the trial court erred in refusing to declare a mistrial after learning that one of the jurors had talked to Betty Petros, daughter of the murder victim. We do not agree. The trial judge held an extensive inquiry into the circumstances of the exchange. He learned that the acquaintance between Ms. Petros and the juror was very distant and determined that the juror was still impartial. The communication between the juror and Ms. Petros did not directly relate to the matters being tried, and certainly did not prejudice the defendant's right to a fair trial. Therefore the court was not obliged to declare a mistrial. *United States v. Khoury*, 539 F.2d 441 (5th Cir. 1976), *cert. denied*, 429 U.S. 1040, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977); *Johnson v. United States*, 207 F.2d 314 (5th Cir. 1953), *cert. denied*, 347 U.S. 905, 74 S.Ct. 632, 98 L.Ed. 1067 (1954); *Hendrix v. State*, 136 Fla. 800, 187 So. 580 (1939). Nor did the acquaintance between the two persons, having been determined to be distant and superficial, require that a mistrial be declared. *See Hartley v. State*, 214 So.2d 489 (Fla. 1st DCA 1968). We find no abuse of discretion.

[3] Appellant contends that the trial judge erred in refusing to disqualify himself from participation in the sentencing phase of the trial. Appellant filed his motion, based on the judge having previously sentenced him to death, at the beginning of the sentencing hearing, after the judge had presided over the guilt phase of the trial.

Florida Rule of Criminal Procedure 3.230(c) provides: "A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time." Appellant's motion was untimely since no good cause was shown for not having filed it ten days before the trial. Sentencing in capital felony cases is based on facts established at the guilt phase of the trial as well as those brought out at the sentencing phase. § 921.141(3), Fla.Stat. (1977). It is therefore highly desirable that the same judge preside over both. The sentencing judge should be aware of all the relevant facts and circumstances. A motion to disqualify a judge on the ground of prejudice that may affect sentencing should be filed before commencement of the guilt phase of the trial so that a new judge, if one is to be designated, may preside over the trial from start to finish and participate in sentencing. Since the motion in this case was not based on anything that happened during the trial, there was no reason for it not to have been filed ten days before the trial began. Moreover, appellant's motion merely stated conclusions and therefore lacked legal sufficiency. We therefore hold that the denial of the motion was not error.

Since we find no merit in any of appellant's contentions that are properly before us, we affirm the convictions.

SENTENCE

[4] Appellant contends that his sentence of death must be vacated because of improper comments of the prosecutor in his argument in the sentencing proceeding. Appellant argues that the prosecutor's reference to the murder as one of the most serious and heinous crimes ever committed in the county was unsupported by evidence and inflamed the jury to appellant's prejudice. Appellant is precluded from presenting this argument since he failed to object to the comments at trial. *Gibson v. State*, 351 So.2d 948 (Fla.1977), *cert. denied*, 435 U.S. 1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978); *State v. Jones*, 204 So.2d 515 (Fla. 1967).

[5] Appellant contends that the trial judge erred at the penalty phase of the trial by not instructing the jury that the mitigating circumstances it could consider were not limited to those listed in section 921.141(6), Florida Statutes (1977). While such an instruction would be consistent with our case law, *Songer v. State*, 365 So.2d 696 (Fla. 1978) (on rehearing), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), and would elucidate the Florida Standard Jury Instruction given in this case, its omission does not require resentencing. The judge instructed the jury that its recommendation should be based on all the evidence presented. At the penalty phase, appellant's sister testified in his defense. No limitations were placed on the kinds of matters about which she was allowed to testify.

The judge's instructions followed the statute in telling the jury that the aggravating circumstances were *limited* to those enumerated in the statute. In instructing on mitigating circumstances, the judge did not say that consideration was similarly limited. By these instructions the jury was properly apprised of its role and duty in recommending a sentence.

[6] We come now to consideration of the propriety of the sentence of death. At trial, appellant admitted to participating in the robbery but denied participating in the shooting. As discussed previously, however, there was competent, substantial evidence upon which basis the judge and jury could conclude that appellant committed the murder with premeditation.

At the penalty phase of the trial, the state proved that appellant had previously been convicted of robbery in New Mexico and that he was on parole at the time of the murder. The judge found as aggravating circumstances that the capital felony was committed by a person under sentence of imprisonment, § 921.141(5)(a), Fla.Stat. (1977), that appellant had previously been convicted of a felony involving the use or threat of violence, *id.* § 921.141(5)(b), that the capital felony was committed during the course of a robbery, *id.* § 921.141(5)(d), that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, *id.*, § 921.141(5)(g), and that the capital felony was especially heinous, atrocious, or cruel. *Id.* § 921.141(5)(h). The judge found that there were no mitigating circumstances.

Under the established precedent interpreting the capital felony sentencing law, the finding that the appellant was under sentence of imprisonment when he committed the murder is supported by the evidence that he was on parole at that time. *Straight v. State*, 397 So.2d 903 (Fla.1981).

The finding that the appellant, at the time of the murder, had previously been convicted of a felony involving violence or the threat of violence is supported by the evidence of his conviction for robbery. The finding that the murder was committed in the course of a robbery was also proper based on the evidence. The finding that the capital felony was committed to disrupt government or law enforcement is supported by evidence showing, as the judge found, that the appellant shot the victims in order to eliminate them as witnesses against him for the crime of robbery.

The finding that the murder was especially heinous, atrocious, or cruel was supported by the evidence that appellant, ignoring the victim's plea to be spared, shot him to death point-blank, in the style of an execution.

There are several aggravating circumstances, properly established by the evidence. There are no mitigating circumstances. The jury recommended death. Under these circumstances, death is the appropriate penalty.

The judgment and sentence are affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

Thomas William MARTIN, Appellant,

v.

STATE of Florida, Appellee.

No. 58173.

Supreme Court of Florida.

Jan. 21, 1982.

Rehearing Denied April 7, 1982.

Defendant was convicted in the Circuit Court in and for Hamilton County, L. Arthur Lawrence, Jr., J., on his plea of nolo contendere, of possession of marijuana, and he appealed. The Supreme Court, Adkins, J., held that: (1) statute requiring "motor vehicles, except private passenger automobiles with no trailer in tow, travel trailers, camping trailers, *and motor homes* * * *" to stop at agricultural inspection stations for inspection was not unconstitutional; (2) defendant's van was not exempted from provisions of governing statute, and thus, detention and search complained of were not illegal; and (3) trial court's finding that warrantless search of defendant's van was conducted with defendant's consent was supported by sufficient evidence.

Affirmed.

1. Inspection ⇐2

Statute requiring "motor vehicles, except private passenger automobiles with no trailer in tow, travel trailers, camping trailers, *and motor homes* * * *" to stop at agricultural inspection stations for inspection did not arbitrarily distinguish between passenger and recreational vehicles on the one hand, and all other vehicles on the other hand, and did not fail to give sufficient notice as to which vehicles were covered. West's F.S.A. § 570.15.

2. Inspection ⇐2

Despite defendant's contention that his van was customized in such a fashion that it was a motor home, his vehicle came within meaning of "truck," under statute making it unlawful for truck to pass inspection station without stopping for inspection, where rear compartment of van, although evidently not intended to be used for cargo carrying alone, did not appear to have been designed solely to carry passengers and their effects either; therefore, detention and search of defendant's van were not illegal. West's F.S.A. §§ 320.01(1)(b), 570.15(1)(a), par. 7, 570.15(2).

3. Searches and Seizures ⇐7(27)

Trial court's finding that warrantless search of defendant's van was conducted with defendant's consent was supported by sufficient evidence, including defendant's opening door and giving inspector access to van's interior.

4. Searches and Seizures ⇐7(27)

Consent to search is question of fact to be determined from totality of circumstances.

William R. Slaughter, II of Slaughter & Slaughter, Live Oak, and James K. Jenkins of Stroup, Goldstein, Jenkins & Pritzker, Atlanta, Ga., for appellant.

IN THE SUPREME COURT OF FLORIDA

LESLIE R. JONES, :
Appellant, :
vs. : CASE NO. 56,199
STATE OF FLORIDA, :
Appellee. :
:

MOTION FOR REHEARING

COMES NOW the appellant, LESLIE R. JONES, pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, and moves this Court for rehearing in the above-styled case. As grounds therefor, appellant states:

1. This Court did not address in its opinion appellant's contention that the trial court improperly found as aggravating circumstances that the crime was committed while appellant was under sentence of imprisonment, and that the crime was committed to disrupt or hinder law enforcement (see Initial Brief of Appellant, p. 44-46), notwithstanding the fact that in imposing the death penalty after appellant's earlier conviction (which was subsequently reversed and remanded by this Court for a new trial) the trial court had expressly made findings of fact that these aggravating circumstances did not apply (see Appendix to Initial Brief of Appellant). Appellant, relying on Burks v. United States, 437 U.S. 1 (1978) and Ashe v. Swenson, 397 U.S. 436 (1970), argued that since the state had failed to prove these aggravating circumstances in the earlier proceeding, it was not entitled to a second "bite at the apple". (Initial Brief of Appellant, p. 46.) Appellant also contended that the principles of North Carolina v. Pearce, 395 U.S. 711 (1969) precluded consideration of these factors in the second penalty proceeding. (Initial Brief of Appellant, p. 45.)

2. In declining to address this issue, this Court may have overlooked the decision of the United States Supreme Court in Bullington v. Missouri, ___ U.S. ___, 68 L.Ed.2d 270, 101 S.Ct. ___ (1981). In that case, relying substantially on Burks, the Court held that where, under applicable Missouri procedure, a jury has heard evidence in aggravation and mitigation in a separate penalty proceeding and has imposed a life sentence upon a defendant, the Double Jeopardy Clause prohibits imposition of the death penalty on his subsequent retrial. In contrast to the usual sentencing proceeding, it can be demonstrated that a Missouri jury's life sentence amounts to an "acquittal" of the elements necessary to impose the death penalty, because (1) the state must prove additional facts, at a proceeding resembling a trial, to warrant imposition of a death sentence, and (2) in order to impose a sentence of death, the jury must designate the aggravating circumstances it has found beyond a reasonable doubt, and must be convinced beyond a reasonable doubt that such aggravating circumstances are sufficient to warrant the death penalty. The Supreme Court said:

> The 'unacceptibly high risk that the [prosecution], with its superior resources, would wear down a defendant' [United States v. DiFrancesco, ___ U.S. ___, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980)], thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error'. Addington v. Texas, 441 U.S., at 424, 60 L.Ed.2d 323, 99 S.Ct. 1804. Given these considerations, our decision today does not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received 'one fair opportunity to offer whatever proof it could assemble,' Burks v. United States, 437 U.S., at 16, 57 L.Ed.2d 1, 98 S.Ct. 2141, the State is not entitled to another.
>
> Bullington v. Missouri, supra, 68 L.Ed.2d at 283.

3. In Florida, as in Missouri, the reasonable doubt standard is used to determined whether a given aggravating circumstance has been proven. State v. Dixon, 283 So.2d 1 (Fla. 1973); Alford v. State, 307 So.2d 433 (Fla. 1975); Williams v. State, 386 So.2d 538 (Fla. 1980). In Florida, unlike Missouri, the jury's verdict as to penalty in a capital case is advisory; the sentencing authority is the trial judge. Fla. Stat. § 921.141(2) and (3); see Ross v. State, 386 So.2d 1191 (Fla. 1980). The Florida judge, like the Missouri jury, must set forth in writing his findings upon which the death sentence is based. Fla. Stat. § 921.141(3); see Hall v. State, 381 So.2d 683 (Fla. 1978) (Order for Clarification).

In the instant case, following the first trial and penalty proceeding, the trial court expressly found that appellant was not under sentence of imprisonment and that the crime was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Following the second trial and penalty proceeding, on the basis of additional evidence adduced by the state, the trial court changed his mind and found that these aggravating circumstances did apply. This amounts to a classic example of the state taking a second bite at the apple; a bite which was available only because appellant had successfully appealed his first conviction. These aggravating circumstances were therefore improperly found, under the doctrines of double jeopardy, Bullington v. Missouri, supra; Burks v. United States, supra, and collateral estoppel, Ashe v. Swenson, supra.

4. It cannot be said that the trial court's error in considering additional evidence of aggravating circumstances of which appellant had previously been "acquitted" was harmless. The jury was thereby exposed to facts which may have improperly influenced its decision to return a recommendation of death rather than a life recommendation. See Stephens v. Zant, 631 F.2d 397, 406-06 (5th Cir. 1980). Had the jury recommended life, the trial court might well have concluded that the facts suggesting a death sentence were not so clear and convincing as to justify overriding the jury's recommendation. See Tedder v. State, 322 So.2d 908 (Fla. 1975).

WHEREFORE, based upon the foregoing reasons and authorities, appellant respectfully requests that this Court grant his Motion for Rehearing, and remand this case to the trial court with directions to conduct a new penalty phase of the trial.

Respectfully submitted,

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished by hand-delivery to David P. Gauldin, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. Leslie R. Jones, #47325, Post Office Box 747, Starke, Florida 32091; on this 4th day of March, 1982.

Steven L Bolotin

STEVEN L. BOLOTIN

Supreme Court of Florida

THURSDAY, APRIL 8, 1982

LESLIE R. JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 56,199

Circuit Court No. 74-1810
(Escambia)

APR [illegible]

PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Ernie Lee Magaha, Clerk
Hon. William S. Rowley, Judge

Steven L. Bolotin, Esquire
David P. Gauldin, Esquire

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—[illegible]

*Note.—Bracketed word inserted by the editors.

Note.—See former [illegible]

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. Case No. 74-1810

LESLIE R. JONES,

Defendant.

FILED & RECORDED
Nov 15 9 31 AM '75
PEARL LEE HAGAHA
CLERK CIRCUIT COURT
ESCAMBIA COUNTY, FLA.

THE COURT'S FINDING OF AGGRAVATING

AND MITIGATING CIRCUMSTANCES

(FIRST TRIAL)

The Court having heard the evidence in both trials and having considered the matter, makes the following findings of aggravating circumstances:

A. The defendant was not under sentence of imprisonment for any other crime.

B. The defendant has never been convicted of a capital felony to the Court's knowledge; but has been convicted of a felony involving the use or threat of violence to another person.

C. The defendant did not knowingly create a great risk of death to many persons.

D. This capital felony was committed while the defendant was engaged or was an accomplice in the commission of a robbery.

E. This capital felony of murder in the first degree was not committed while the defendant was engaged in the commission of or in flight after committing a life felony.

F. This capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

G. This capital felony was committed for pecuniary gain.

H. This capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

.. This capital felony was especially heinous, atrocious and cruel.

Mitigating circumstances:

A. This defendant has a significant history of prior criminal activity.

B. This defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

C. The victim was not a participant in defendant's conduct or consent to his acts.

D. This defendant was an accomplice in the capital felony committed, there being another participant; but the defendant, based upon the evidence, was the perpetrator or fired the shots that resulted in the capital felony.

E. This defendant did not act under extreme duress or under the substantial domination of another person in the commission of this capital felony.

F. The capacity of this defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

G. The age of this defendant at the time of the commission of the crime is not a factor, he having reached majority of 18 some 7 years prior to the commission of the crime.

The Court's finding that this offense was especially heinous, atrocious and cruel, is based upon the evidence that the defendant forced the decedent to lay prone faced down on the ground and after having taken the money in the crime of robbery, and while the decedent and another person were pleading and begging for their lives, and without there being any threat of violence, harm or injury to the defendant in anyway, the defendant fired a .32 caliber slug into the back of the head of the decedent and fired two shots; one into the back of the head of the other person and one into her arm and chest.

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE WITNESS MY HAND AND OFFICIAL SEAL

ERNIE LEE MAGAHA
CLERK, CIRCUIT COURT
ESCAMBIA COUNTY, FLORIDA

BY: _____ D.C.

William L. Lowery
CIRCUIT JUDGE

shot them because they could identify him. The exact amount obtained was never testified to.

Defendant Jones took the stand in his own behalf and denied that the confession was given freely and voluntarily, testifying that prior to giving the confession he had been threatened by an officer who had told him something to the effect that there was an officer who was good at killing niggers, and had killed some other niggers and another one wouldn't make any difference to him, but did not identify this officer as any of the officers who had appeared and testified they were present when the waivers and confessions were taken. The defendant denied that he had killed anyone and denied shooting the victims. He testified that the weapon he had was not the weapon introduced in evidence as the one firing the shots. He testified he had thrown the weapon that he had away.

FACTS OF RECORD

Based upon the evidence, the Court finds there was a robbery and Leslie Jones was one of the co-principals participating in the robbery and in the process one person was shot and later died from wounds received and another was shot but survived.

Based upon the evidence the record would support Leslie Jones was the person who fired the shot.

Based upon the record Leslie Jones was one of the persons who was a participant in the robbery.

Based upon the record at the time it was to obtain money.

That the record would support that he gave a confession on more than one occasion after being advised of his constitutional rights to remain silent and right to counsel.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

The aggravating circumstances in this case are:

1. ~~That the~~ defendant had previously been convicted of a ~~felony~~. W.I.R.

2. That the defendant had been previously convicted of another felony involving violence or the threat of violence.

3. That the crime was committed while the defendant was under sentence for a prior offense, he being on parole for the prior robbery which was committed.

4. The crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission or a robbery.

5. That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; to-wit: he shot them because they could recognize him.

6. That the cime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

There are no mitigating circumstances presented.

IN THE SUPREME COURT OF FLORIDA

LESLIE R. JONES,	:	
Appellant,	:	
v.	:	CASE NO. 56,199
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

ON APPEAL FROM THE
FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

MICHAEL M. CORIN
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SECOND JUDICIAL CIRCUIT
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(904) 488-2458

ATTORNEY FOR APPELLANT

There are no mitigating circumstances presented (R-803-804).

The above-quoted findings should be read in conjunction with the court's oral pronouncements at the sentencing hearing. Particularly, the judge's observation concerning the State's lack of redress if he decided to impose a life sentence in the face of what he perceived to be the facts of the case -- with special reference to the aggravating and mitigating circumstances and the court's interpretation of the law (R-823-829;828). In order to facilitate this Court's required responsibility to determine independently whether the imposition of the ultimate penalty is warranted, that is, see Songer v. State, 322 So.2d 481 (Fla. 1975), Adams v. State, 341 So.2d 765 (Fla. 1976), and Aldridge v. State, 351 So.2d 942 (Fla. 1977), the appellant will discuss separately the trial court's findings, or lack thereof, concerning the aggravating and mitigating circumstances.

Before entering into this discussion, the appellant would suggest that, as a matter of law, this Court should reject the trial court's findings on the third and fifth grounds set out above. Neither of these findings were made by the trial judge to support the first death sentence he imposed upon the appellant. Neither of these findings are based upon objective information concerning identifiable conduct on the part of the appellant occurring after the time of the original sentencing proceeding. In factual justification for this position the appellant would respectfully direct the Court's attention to the supplemental transcript of record on appeal, containing the trial court's

findings of aggravating and mitigating circumstances which was submitted to this Court during the pendency of the appellant's original appeal in Case #47,472 of which this Court can take judicial cognizance. Roberson v. State, 45 Fla. 94, 34 So. 294 (Fla. 1903). To ease review, on this point, there is submitted with this brief an Appendix which contains the just-described supplemental transcript of record on appeal. A perusal of same, will show that the trial court found that the appellant was not under sentence of imprisonment and did not commit the capital felony to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws. As legal authority, the appellant would rely on North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), where it is said:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the consitutional legitimacy of the increased sentence may be fully reviewed on appeal.
>
> 395 U.S. at 725-726 (footnotes omitted).

Reliance upon Pearce, supra, is not erroneous simply because the actual sentence imposed upon the appellant was the same. The

due process question is one of vindictiveness and the fundamental principles of fairness upon which that constitutional provision is grounded cannot tolerate allowing the appellee two bites at the apple of proof. See also: Burks v. United States, 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978) and Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970). In addition to this constitutional basis for rejecting the trial court's finding on the third and fifth grounds, the appellant will set out below additional reasons why the court's findings on these aggravating circumstances should be rejected on independent review by this Court.

1. THAT THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF A FELONY.

In fairness to the court below, appellant would note that his copy of the record on appeal at Page 803 appears to show that someone, presumably the trial judge, attempted to cross out this circumstance and placed some initials (W.S.R.) by the attempted deletion. This observation was somewhat verified by a telephonic communication with the trial court clerk's office concerning what the record in that court reveals. In any event, it should be argued and noted that this finding is not one of the statutory aggravating circumstances listed in Section 921.141(5), Florida Statutes. As such, if there are any mitigating circumstances found, even if valid aggravating circumstances exist, the appellant's sentence must be set aside. Elledge v. State, 346 So.2d 998 (Fla. 1977). Furthermore, this finding when considered with the second finding discussed below should be disregarded lest there be an impermissible doubling of the aggravating

IN THE SUPREME COURT OF FLORIDA

LESLIE R. JONES,

Appellant,

v. CASE NO. 56,199

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE
FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

MICHAEL M. CORIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

totally out of line. To even try to compare the appellant's prior robbery and simultaneous/episodic auto theft conviction to Dobbert's prior criminal history is really going too far. The appellant won't dignify the appellee's endeavor with lengthy distinctions. However, the Court's attention is respectfully directed to 328 So.2d at 435 which will show the significant difference between Dobbert's prior criminal history and the appellant's. On the authority of Huckaby v. State, 343 So.2d 29 (Fla. 1977), this Court can find statutory mitigating circumstances not found by the trial court. On the authority of State v. Dixon, supra, and Lewis v. State, supra, this Court should find this mitigating circumstance.

Finally, in its attempt to "summarily" dispatch (BA-31) with the appellant's due process - double jeopardy argument based on North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), Burks v. United States, 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978) and Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), relating to the trial court's impermissibly finding aggravating circumstances not found in the appellant's original trial, the appellee cites to the ex post facto case of Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344, 97 S.Ct. 2290 (1977) (BA-43-44). The appellant feels further distinction is unnecessary.

The appellee in its brief shows nothing which should pursuade the Court not to grant a new sentencing trial.

G - 2

Leslie JONES, Appellant,

v.

STATE of Florida, Appellee.

No. 47472.

Supreme Court of Florida.

June 26, 1975.

Rehearing Denied Oct. 24, 1975.

Defendant was convicted in the Circuit Court, Escambia County, William S. Rowley, J., of murder in the first degree, and death sentence was imposed, and he appealed. The Supreme Court, held that: (1) defense motion for psychiatric examination to determine defendant's sanity at the time of the offense could not be denied on ground that the results of the examination would be used for more than perfecting a defense based on insanity; (2) trial court erred in denying motion for examination on sole ground that the motion was not properly filed, while precluding defendant from showing good cause for omission of the prescribed notice and procedure, and (3) in deciding whether to order an examination, trial court must consider all the circumstances, and unless clearly convinced that examination is unnecessary, order an examination before beginning or proceeding with trial.

Reversed and remanded for new trial. Adkins, J., dissented.

1. Mental Health ⇐434

Defendant's motion for psychiatric examination to determine his sanity at the time of the offense could not be denied on ground that court was convinced that results of the examination would be used for more than perfecting a defense based on insanity; though defense counsel must truthfully set forth all information required by rule in order to receive a favorable ruling on his motion for examination, once examination is completed, counsel may use the information gained therefrom in preparation for trial, for whatever lawful purposes he deems fit. 33 West's F.S.A. Rules of Criminal Procedure, rules 3.210, 3.210(b).

2. Mental Health ⇐434

Though rule provides that defendant must give notice of intention to rely on defense of insanity at or before arraignment and defendant did not file motion for examination until two days after date originally scheduled for trial, it was error to refuse to grant examination on the sole ground that the motion was not properly filed, without allowing defendant to show good cause for omission of prior notice, in case in which no arraignment was ever held. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.210(b).

3. Mental Health ⇐434

In deciding whether to order an examination to determine sanity at time of offense, trial court must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination before beginning or proceeding with trial. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.210(b).

Henry Clay Mitchell, Jr., Pensacola, for appellant.

Robert L. Shevin, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This is an appeal from a conviction of murder in the first degree for which the jury recommended and the trial judge imposed a sentence of death. We have jurisdiction pursuant to Article V, Section 3(b)(1), of the Florida Constitution. We reverse the conviction and the sentence.

On December 2, 1974, appellant and one Calvin Dugan entered a liquor store in Pensacola, Florida, with the intent to commit a robbery. Both were armed; Dugan was masked. Two employees were present in the store, Mrs. Hagg and Mr. Petrus. Both were forced to lie face down on the floor

while Jones and Dugan emptied the cash registers. Before leaving the store, one or both of the robbers shot Mrs. Hagg and Mr. Petros. Mr. Petros was fatally wounded.

The testimony was conflicting as to who owned the gun and who pulled the trigger. Mrs. Hagg was unable to testify which man fired the fatal shots since she was lying face down on the floor, but she did notice the peculiar shoes worn by one of the robbers and was able to relate his movements during the robbery. Important portions of the state's evidence were presented by the witness Anderson, who was initially charged with the appellant. The charges against him were later dismissed. He testified that at the time of the robbery he was standing outside the liquor store and observed Dugan and Jones enter the store and, after several minutes, make their getaway. It was his testimony that appellant was not carrying a gun when he came out of the building.

Appellant raises numerous points on appeal:

1. The trial court erred in not allowing a physician to examine the appellant prior to trial.

2. The court erred in excluding 105 members of the jury venire ex parte.

3. The court erred in failing to grant appellant's request for a jury instruction on justifiable homicide.

4. The trial judge improperly expressed an opinion as to appellant's guilt.

5. The court erred in denying a motion for change of venue.

6. The court erred in failing to grant a new trial because a juror fainted during the taking of testimony.

7. The court erred in holding that Section 782.04 and Section 921.141, Florida Statutes, are constitutional.

Appellant also alleges several errors in the sentencing portion of the trial.

Appellant was indicted on the 11th day of December, 1974. The case was set for trial on April 8, 1975, but was continued on motion of the defendant. On April 10, 1975, two days after the date scheduled for trial, appellant filed notice of insanity, stating his intention to rely on the defense of insanity at the time of the offense, as provided in Florida Rules of Criminal Procedure, Rule 3.210(b).[1] Rule 3.210(b) provides that a defendant, intending to rely on the defense of insanity, must give notice of his intention at or before arraignment and must file a statement of particulars showing as nearly as he can the nature of insanity he expects to prove and the names and addresses of the witnesses by whom he expects to prove such insanity. The rule also provides that the court may appoint qualified experts, not exceeding three, to examine the defendant as to his sanity at the time of the offense.

1. Rule 3.210(b), Florida Rules of Criminal Procedure, provides as follows:

> (b) *At Time of Offense.* When in any criminal case it shall be the intention of the defendant to rely upon the defense of insanity, no evidence offered by the defendant for the purpose of establishing such insanity shall be admitted in such case unless advance notice of such defense shall have been given by the defendant as hereinafter provided.
>
> If the defendant upon arraignment, or prior thereto, notifies the court that he will rely upon insanity as one of his defenses, then the court will hear the parties and require the defendant to file, within such time as may be fixed by the court, a statement of particulars showing as nearly as he can the nature of insanity he expects to prove and the names and addresses of the witnesses by whom he expects to prove such insanity.
>
> Upon the filing of said statement of particulars by the defendant, upon motion of the prosecution, the court may cause the defendant to be examined, in the presence of attorneys for the State and for the defendant, if they choose to be present, by one or more disinterested qualified experts, not exceeding three, appointed by the court, at such time and place as may be designated in the order of the court, as to the sanity, or insanity, of the defendant at the time of the commission of the alleged offense and subsequent thereto.
>
> Upon good cause shown for the omission of the notices and procedure as to the defense of insanity, as here set forth, the court may in its discretion permit the introduction of evidence of such defense.

[1] We reject the argument advanced by the state that the court was justified in denying appellant's motion on the grounds that appellant intended to use the examination for purposes other than determining his sanity at the time of the offense. These additional intended uses are borne out by the record, but, the question remains, may a trial court deny a defendant's motion for psychiatric examination if it is convinced that the results of that examination will be used for more than perfecting a defense based on insanity? We think not. While defense counsel must truthfully set forth all information required by Rule 3.210 in order to receive a favorable ruling upon his motion, once the examination is completed, counsel may use the information gained therefrom in preparation for trial, for whatever lawful purposes he deems fit.

[2] Appellant admits that his notice of insanity and motion for examination were not filed in strict compliance with the rule. He points out, however, that in this case no arraignment was ever held. The "late filing" cannot bar his right to examination since the time for filing never ended. The court refused to grant an examination on the sole ground that the motion was not properly filed.

Under the circumstances, we agree with appellant that the trial judge erred in denying his motion for examination. In effect, the court eliminated appellant's sole defense. The last paragraph of Rule 3.216(b) states:

> Upon good cause shown for the omission of the notices and procedure as to the defense of insanity, as here set forth, the court may in its discretion permit the introduction of evidence of such defense.

We think appellant was precluded from showing good cause.

[3] In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the United States Supreme Court held that a defendant's due process right to a fair trial was violated when the trial court failed to suspend a trial pending the determination of defendant's competence to stand trial, where prior to trial, counsel filed a technically insufficient motion requesting a mental examination. The court states:

> The import of our decision in *Pate v. Robinson*, [383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)] is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

While the decision in *Drope* involved an examination to determine a defendant's competency to stand trial, its reasoning is equally applicable here where examination was sought to determine the defendant's sanity at the time of the offense. In deciding whether or not to order an examination, the trial judge must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination before beginning or proceeding with trial. Having reached this conclusion we find it unnecessary to determine the other issues raised on appeal.

Accordingly, the conviction and sentence are reversed and the case remanded for a new trial.

It is so ordered.

OVERTON, C. J., and BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., concur.

ADKINS, J., dissents.